Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1338

Appeal MA-990261-1

City of Toronto

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NATURE OF THE APPEAL:

The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City). The request was for access to a legal opinion respecting the City's proposed new sewer by-law. The appellant believed that the legal opinion was obtained from the law firm of Genest, Murray, either at the behest of the City or the World Wildlife Fund (the WWF) which "drafted a model by-law that the City has more or less adopted." The appellant stated that certain parts of the legal opinion have already been made public.

The City located the records responsive to the request and denied access, in full, pursuant to section 12 of the *Act*.

The appellant appealed the City's decision to deny access. The appellant takes the position that solicitor-client privilege has been lost through waiver.

This office initially sent a Notice of Inquiry to the City seeking representations on the application of section 12 to the record. The City provided representations in response.

At about the same time, this office also received representations from the WWF, although the WWF was not sent a copy of the Notice of Inquiry. In addition to addressing the application of section 12 to the record, the WWF submitted that the exemption at section 10(1)(b) (third party information) applied to the record.

This office then sent a Notice of Inquiry to, and received representations from, the appellant. This Notice of Inquiry was restricted to the issues under section 12.

In order to fully address the issues under both sections 10(1) and 12, I sent a supplemental Notice of Inquiry to the WWF and the City, seeking representations on those issues. Only the City provided representations in response to the supplemental Notice of Inquiry.

RECORD:

The Report of Mediator described the record at issue as follows: "The records consist of a six page memorandum with a one page cover sheet."

In its representations, the City submits that the fax cover sheet is not responsive to the request "since it is not part of the 'legal opinion' requested by the appellant."

The appellant states simply that it "has no information with respect to the contents of the fax cover page" and "it may be relevant if it contains any commentary with respect to the advice being provided."

I do not accept the City's submission. First, the City provided all seven pages of records to this office upon being notified of the appeal. Second, the City did not at that time explain that the cover page was not responsive, nor did the City advise the mediator that her description of the record was erroneous, despite

being given an opportunity to do so. In the circumstances, I find that all seven pages of records, including the cover page, are responsive to the request and are at issue in this appeal.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide an institution with discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and

   (b) the communication must be of a confidential nature, and

   (c) the communication must be between a client (or his agent) and a legal advisor, and

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation [Orders 49, M-2, M-19].

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation [Order 210].

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

The City has claimed the application of common law solicitor-client communication privilege to the record. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both

> informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Representations

The City provides the following background to the creation of the record:

> For several years, the former Municipality of Metropolitan Toronto (Metro) had been developing draft amendments to its Sewer Use By-law No. 153-89. In 1996, the [WWF] had contacted several Metro Councillors to ask that a "pollution prevention" (P2) initiative be included in the existing sewer use by-law. Metro Council approved this and directed Works and Emergency Services staff to work with the WWF on the P2 plan section of the by-law.
>
> Following amalgamation, the new City Council recognized the need to harmonize various sewer by-laws of the former municipalities including Metro's. The creation of a new sewer use by-law was identified as one of the service levelling issues.
>
> The WWF continued to play a role in the development of the new City's proposed sewer use by-law. In October of 1998, at the request of the WWF, a lawyer with the WWF's firm of solicitors, Genest Murray, prepared a draft sewer use by-law for the City incorporating P2 principles.
>
> In January 1999, the WWF sent a copy of the first draft of the City's proposed sewer use by-law to the lawyer and asked her to give an opinion on it. On February 4, 1999, a memo containing the lawyer's legal opinion was provided to the WWF, who in turn sent a copy to the City's Manager, Industrial Waste and Stormwater Quality, Quality Control and System Planning on February 12, 1999. This memo was considered by the City's Works and Emergency Services staff in drafting the proposed sewer use by-law.
>
> In June 1999, the City initiated a series of industry and public consultations, including an industry meeting held on June 2, 1999.

Specifically with respect to section 12, the City submits:

> The City is relying on Branch 1 and submits that the solicitor-client communication privilege applies to [the record] since it satisfies the following test:

(a) there is a written or oral communication, and

(b) the communication must be of a confidential nature, and

(c) the communication must be between a client (or his agent) and a legal advisor, and

(d) the communication must be directly related to seeking, formulating or giving legal advice.

. . . [The record] is a written communication of a confidential nature. This is supported by the note on the facsimile cover sheet . . . which states that "this is confidential info so be discrete please".

. . . [The record] is between a client, the WWF (specifically a Consultant to the WWF and the Director, Wildlife Toxicology Program) and its legal advisor, a named solicitor with the law firm of Genest Murray.

[The record] confirms the request of the WWF for a legal opinion on the City's proposed new by-law. [The record] sets out the lawyer's legal advice on the form and content of the proposed new by-law, in particular the P2 sections . . . Therefore . . . [the record] is directly related to the seeking, formulating or giving of legal advice.

Accordingly, all four parts of the test have been met and solicitor-client communication privilege applies to the record at issue.

In its supplemental representations, the City submits:

The test [for solicitor-client privilege articulated by the IPC] does not specifically require that the client must be the institution that has custody or control of the record.

In Order P-136, former Commissioner Sidney Linden considered whether section 19 (the provincial equivalent of section 12) applied to certain records including Record #5 which was a copy of a letter from a solicitor to a client dated September 4, 1987. This record was written to and for persons outside the institution. Nevertheless, Commissioner Linden found that it met all the criteria of the solicitor-client test.

At page 8 of the Order, he stated:

> The only remaining issue is whether or not the privilege has been waived. Record #5 was written to and for persons outside the institution, and was given to an institution official by someone other than the addressee.
>
> Although these two facts could support an argument that the privilege has been waived, in my view, they are not in themselves sufficient to establish

> waiver. Only the client can waive solicitor-client privilege, and, although it is clear that persons other than the solicitor and the client have access to the letter, no evidence has been presented during this appeal to indicate that the client has waived the privilege available to him at common law. Accordingly, I find that the common law solicitor-client privilege attaches to Record #5, and I uphold the decision of the head not to release Record #5 pursuant to section 19.

In Order P-49, former Commissioner Linden considered an appeal involving the Ministry of Community and Social Services, a named construction company (the third party) and a named Home for Aged Persons. Record #9 was a letter from the Home's solicitor to the Home's Administrator advising of developments in the dispute between the Home and the third party and providing advice in the form of legal alternatives available to the Home. With respect to this record, former Commissioner Linden stated:

> In my view, the criteria for the first branch of solicitor-client privilege have been met . . . The institution, as funder of the Home's construction project, cannot, in my view be considered sufficiently separate in interest from Home to suggest that the institution's possession of the record constitutes waiver of solicitor-client privilege by Home. Therefore, Record #9 is eligible for exemption by the head under section 19.

The City submits that the reasoning in each of the above orders applies equally to the present case for the following reasons.

. . . . .

The record at issue while prepared for the WWF was ostensibly for forwarding by the WWF to the City for the City's consideration in drafting its proposed sewer use by-law. The City submits that there exists a common or joint interest by the City and the WWF in the matter addressed in [the record] . . .

In addition, the WWF has stated that it has shared [the record] only with the City and that no one else has been provided with a copy. In communications with the City, the WWF has strongly objected to any disclosure of [the record] to any other parties.

In summary, the City submits:

1. Although the WWF is the client and not the City, this does not affect the solicitor-client privilege attached to [the record]; and

2. The WWF's sharing of the memo with the City does not constitute a waiver of this privilege by the WWF.

The WWF submits:

> . . . [The record] is a legal opinion that deals [with] matters of constitutional law, provincial law, and the proposed City of Toronto sewer-use by-law. Our request [that the record not be disclosed] is based on the principles and provisions for solicitor-client confidentiality and protection of third party information.
>
> On the first point, the legal opinion in question was prepared by a Toronto law firm for WWF and is thus subject to solicitor-client confidentiality . . .

The appellant submits that the record cannot be exempt under section 12, since it was never subject to solicitor-client privilege. In the alternative, the appellant argues that any existing privilege was waived since the advice in the record "was intended to be used at, and was disclosed, at public meetings . . ." On the first point, the appellant submits:

> First of all, the existence of any right of privilege in the document belongs to the WWF and not to the City. By the City's own admission, the WWF requested the opinion from its own solicitor, ostensibly for its own use. It does not appear that the opinion was obtained at the behest or direction of the City . . . [T]he City is not entitled to claim privilege unless it is clear from the facts that the document came into their possession in a situation where privilege would arise independently . . .
>
> To establish solicitor-client privilege, the document in question must pass all four tests to be qualified for exemption . . . [T]he City has failed the test that "the communication must be of a confidential nature". It appears in the first instance that this opinion was not just available to representatives or agents of the City and the WWF. It also appears that the opinion was given to the federal government representative on these issues. Moreover, if the opinion had been meant to be confidential, it was inappropriate for it to be available at a public meeting in any event. Moreover, the fact that any portion of the opinion, or even its existence, was disclosed at a public meeting also indicates that either the opinion was not meant to be confidential or that a decision was made to disclose its contents.

The appellant goes on to provide more detailed submissions about the extent to which the contents of the record were allegedly disclosed both within and outside the City.

Application of solicitor-client privilege

In my view, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside government. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:

> Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the **government** either commences litigation or is

> obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
>
> . . . . .
>
> If you do things to discourage the client from telling the lawyer the true story, then the **government** does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the **government**, which is spending taxpayers' money, should be able to be certain that **public servants** tell our lawyers the truth. We do not want to discourage **public servants** from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added]
>
> [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]

Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter. In Order P-1342, Adjudicator Holly Big Canoe described the principal of "joint interest" as follows:

> It is possible for two or more parties to have a joint interest in a record which could have an impact on solicitor-client privilege. In *Johal v. Billan* [1995] B.C.J. No. 2488 (B.C.S.C.) the court found that a husband and wife who had consulted the same solicitor for the purpose of drafting wills had waived the privilege between themselves, but maintained this privilege against third parties who did not share a joint interest with one or both of them. This judgement makes reference to this interest being supported by Mr. Justice Sopinka in the text *Law of Evidence in Canada*, at page 638:
>
> > Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication.... Moreover, a client cannot claim privilege as against third persons having a joint interest with him in the subject-matter of the communication passing between the client and the solicitor.

Although Adjudicator Big Canoe rejected the joint interest argument in Order P-1342, it has been found to apply in other cases. In Order P-49, for example, former Commissioner Sidney Linden found a joint interest between the Ministry of Community and Social Services and a home for the aged funded by the Ministry in the context of a dispute over the performance of a construction contract.

In this case, based on the representations of the parties, and on the face of the record, it is clear that the client for the purposes of the record is the WWF, not the City. The City submits, however, that it has a joint interest with the WWF. I do not accept the City's submission. I have not been provided with evidence sufficient to establish a "joint interest" between the WWF and the City for the purposes of solicitor-client privilege. The WWF is a public interest organization with a focus on conservation and environmental issues, and in this case was seeking to ensure that the City adopted a by-law which was sensitive to these issues. Although it may be said that the City also had an interest in adopting an environmentally sound by-law, the WWF was acting as an arm's-length public interest group. I am not convinced that the interests of the WWF and the City in regard to the adoption of an environmentally sound by-law are sufficiently connected to be accurately characterized as a "joint interest".

Waiver

Even if solicitor-client communication privilege could apply to the record when originally communicated to the WWF, for the same reasons I found no joint interest, I would have found that privilege was lost through waiver when subsequently provided to the City. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> >
> > Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> . . . . .
>
> In *S. & K. Processors Ltd.* ... McLachlin J. noted:
>
> > However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...

> In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In my view, by providing the record to the City, the consultant, who was effectively an agent of the WWF, waived any privilege which may have attached to the record. The fact that the consultant asked that the City treat the record confidentially does not negate this finding.

This conclusion is consistent with the finding of Adjudicator Holly Big Canoe in Order P-1342. In that case, the Adjudicator found that disclosure of otherwise privileged material by a Crown Prosecutor to the Law Society of Upper Canada constituted waiver. This decision was upheld by the Divisional Court in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495.

Finally, Orders P-46 and P-136, relied on by the City, are distinguishable on their facts. The WWF and the City do not have a relationship akin to that between the home for the aged and the Ministry in Order P-46. In Order P-136, former Commissioner Linden stated that "no evidence has been presented during this appeal to indicate that the client has waived the privilege available to him at common law." In the current appeal, the representations of the City and the WWF, together with the records themselves, provide sufficient evidence to support a finding of waiver, even if privilege did attach to the record originally.

Conclusion

Section 12 cannot apply to the record because the City is not the client with respect to the communication. Even if privilege did attach to the record, it was waived, and thus section 12 cannot apply. Therefore, the record must be disclosed, subject to any finding I may make under section 10(1)(b) of the *Act* below.

THIRD PARTY INFORMATION

Introduction

The WWF has claimed that section 10(1)(b) of the *Act* applies to the record. The City has not claimed nor made submissions on this issue.

For a record to qualify for exemption under section 10(1)(b), the party opposing disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in paragraph (b) of section 10(1) will occur [Orders 36, M-29, M-37, P-373].

The Court of Appeal for Ontario, in upholding Order P-373 of this office, stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, **the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm**. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
>
> [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 164 D.L.R. (4th) 129 at]

The WWF submits:

> . . . [The record] was provided in confidence to [named City employee] as a professional courtesy to assist him in the development of a new Sewer-use By-law for the City of Toronto. The [*Act*] deals with third party information in section 10, with subsection (b) being relevant here:
>
> > (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
> >
> > > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> [The named City employee] is the only third party to whom we have provided a copy of the legal opinion. Over the years, WWF has developed a good-faith relationship with [the named City employee's] office to assist him with the task of developing a new sewer-use by-law as instructed by Toronto City Council. Disclosing the legal advice would discourage cooperative efforts between WWF and the City in the future and may affect WWF's future ability and willingness to fully discuss issues of importance with municipal or provincial government staff.
>
> In addition, it is conceivable that disclosing our legal opinion may result in undue financial benefits to the party person requesting the information since they will not have to pay for it.
>
> Overall, while the legal opinion is in no way harmful to WWF or the City of Toronto, disclosing it would . . . affect WWF's propriety rights, harm WWF's relationship with the City, and set an unsalutory precedent.

I am not persuaded that section 10(1)(b) applies in the circumstances.

The record contains the solicitor's legal analysis of the draft by-law. This type of information clearly does not qualify as a trade secret or scientific, technical, commercial, financial or labour relations information.

Further, although some of the information consists of the views of the WWF, as represented by its solicitor, the originating source of much of the material in the record relating to the proposed by-law is the City, not the WWF. In these circumstances, this latter information cannot qualify as having been "supplied" to the City within the meaning of section 10(1)(b) [see my Order PO-1805]. In addition, I cannot conclude that the record was supplied to the City in confidence, given my finding above that the WWF waived its solicitor-client privilege in the record.

Finally, the WWF has not persuaded me that it is reasonable to expect that information of this nature would no longer be supplied to the institution. I note in this regard that the City has not expressed its agreement with this position, which serves to reinforce my finding.

To conclude, I find that the WWF has failed to establish any of the three requirements for the application of section 10(1)(b) of the *Act*.

ORDER:

1. I order the City to disclose the record to the appellant no later than **October 26, 2000**, but no earlier than **October 23, 2000**.

2. In order to verify compliance with this order, I reserve the right to require the City to provide me a copy of the material disclosed to the appellant pursuant to provision 1.

Original signed by: September 21, 2000
David Goodis
Senior Adjudicator